APPEAL NO. 040640
FILED MAY 6, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on February 4, 2004. With respect to the single issue before her, the hearing officer determined that the Independent Review Organization's (IRO) decision that the respondent's (claimant) proposed spinal surgery is not medically necessary is against the preponderance of the evidence. The hearing officer rendered a decision that the claimant's proposed spinal surgery is medically necessary. In its appeal, the appellant (carrier) asserts error in the admission of Claimant's Exhibit No. 3 and also in the determination that the IRO's decision is not supported by the preponderance of the evidence. In her response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

Initially, we will consider the carrier's assertion that the hearing officer erred in admitting Claimant's Exhibit No. 3, which are responses of the surgeon who is recommending spinal surgery for the claimant to questions posed by the ombudsman assisting the claimant. The carrier argues that the exhibit should not have been admitted in evidence because it "did not constitute medical evidence, and in essence, allowed for the admission of a second response by [Dr. P] to the IRO's decision." Even assuming that Claimant's Exhibit No. 3 was not a medical report and that it did provide Dr. P with a second opportunity to respond to the IRO decision, we find no merit in the assertion that either factor would provide a basis to exclude the exhibit from evidence. We perceive no error in the hearing officer's admission of the challenged exhibit.

The carrier asserts that the hearing officer's decision is against the great weight and preponderance of the evidence, asserting that the decision of the IRO carries presumptive weight. We have previously addressed the issue of IRO "presumptive weight" versus designated doctor's report "presumptive weight" in Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002. In that case, upon review of the "presumptive weight" provision in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(v) (Rule 133.308(v)), the Appeals Panel determined that it is an evidentiary rule creating a rebuttable presumption, as distinguished from a conclusive presumption, as is the case with the designated doctor rule. As explained in Appeal No. 021958-s, *supra*, the consequence of this being a rebuttable presumption, as opposed to a conclusive presumption, is that "its effect is to shift the burden of producing evidence to the party against whom it operates. . . . The evidence is then evaluated, as it would be in any other case." In this case, the hearing officer pointed to the evidence that demonstrated the claimant's need for spinal surgery and explained why that evidence was more credible than the opinions from the IRO and the peer review doctor against surgery. The hearing officer ultimately determined that the preponderance of the evidence was contrary to the IRO decision. Nothing in our review

of the record indicates that the hearing officer's decision in that regard requires reversal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

According to the information provided by the carrier, the true corporate name of the insurance carrier is **ACE USA/OLD REPUBLIC INSURANCE** and the name and address of its registered agent for service of process is

ROBIN MOUNTAIN
6600 EAST CAMPUS CIRCLE DRIVE, SUITE 200
IRVING, TEXAS 75063.

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Elaine M. Chaney
Appeals Judge

CONCUR:

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Veronica L. Ruberto
Appeals Judge

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Edward Vilano
Appeals Judge